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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Tehama)

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL RUSSELL TURNER, Defendant and Appellant.	C086117 (Super. Ct. No. 17CR001411)

A jury found defendant Michael Russell Turner guilty of meeting a minor for lewd purposes and contacting a minor with the intent to commit a sexual offense. He also admitted a prior strike conviction. On appeal, he argues there was insufficient evidence to support the jury's finding that he demonstrated an unnatural and abnormal sexual interest in children. He further argues the prosecutor committed misconduct, and the court erred in the giving of a jury instruction and again at sentencing when it refused to dismiss his prior strike offense and when imposing the upper term for contact with a

minor for lewd purposes. We agree with the parties that the court erred when instructing the jury but conclude any error was harmless. Because the error resulted in defendant's receiving the wrong sentence for his conviction of contacting a minor with the intent to commit a sexual offense, remand for resentencing is necessary. We otherwise affirm.

FACTUAL BACKGROUND

We relate the facts of defendant's crimes here and the procedural background relevant to the issues on appeal when addressing defendant's claims.

In May 2017, defendant posted an advertisement in the casual encounters section of Craigslist. The post described defendant as a 47-year-old man who recently moved to Platina from the Bay Area and had had no luck meeting anyone. Defendant was "just looking to meet someone who is open to come hang out for a night or two, eat, [watch] movies, listen to music, have a drink or two, and get naked in between it all." Defendant ended his post saying, "Other than that I handle myself well when we are slapping sweat and I have been known to really get along well with younger women :) Let me know." He attached several pictures to the post showing his home and himself both clothed and nude. Several of the pictures depicting defendant in the nude showed him with an erection.

Tehama County Bureau of Investigations Officer Heidi Curtis was monitoring Craigslist's posts for adults attempting to contact minors. Defendant's assertion that he got along well with younger women alerted Officer Curtis that defendant may be attempting to contact minors for sexual encounters, requiring further investigation. So, Officer Curtis sent defendant a message through Craigslist posing as "Maddie Paulson." The message read, "I'm for real . . . you get along with younger girls huh???" and included a phone number where "Maddie" could be reached. Thereafter, defendant texted "Maddie" and the two engaged in a several-week-long texting conversation.

In "Maddie's" initial texts she indicated that she was young and in high school. She told defendant she played percussion in the band and that he could not text her after

11:00 p.m. because her mother would freak out. Defendant responded, "Well we dont want mom freaking out now do we :)." Over the course of the next few text conversations, defendant and "Maddie" assured each other they "wouldnt put [each other] off." Defendant then asked "Maddie" whether she "had the experience of a boyfriend yet :)" and to send him a G-rated picture so he could see with whom he was texting. "Maddie" sent defendant a photo of a young blond woman baring cleavage and wearing heavy makeup. The photo would not immediately load on defendant's phone, so he responded "Its cool Maddie. I am very patient and I think about you all day so I am confident that you will look very pleasingtto [*sic*] my eyes :)." Defendant later gave "Maddie" his e-mail address so she would send photos of herself there as well.

Around this same time, defendant drove to Red Bluff, where "Maddie" lived, and texted her that he wished he "could have picked her up from school :)." After "Maddie" said she was at the movies and was sorry to miss him, defendant replied, "Its cool. I was mostly just playing. I didnt expect you would ever want to meet for the first time that way although I would be good with it."

The next day, defendant texted "Maddie" again. He told her his plans for the weekend and then continued, "Of course I am always open to coming down to Red Bluff if you can get away for a few minutes :)." "Maddie" responded that she was not available but would be the next weekend and wondered if they could "Netflix and chill??" "Maddie" also asked defendant the age of the youngest girl he had ever hung out with. Defendant responded that he had the capability to stream video and they could "Netflix and chill however long you like :)." Defendant also told "Maddie" he had spent time with a 16 year old but they never touched sexually because of her age. "Maddie" told defendant she was 15 years old and clarified that "Netflix and chill" meant to "hook up." Defendant responded, "We can talk about that after we meet. Being that you say you are under 18 we need to keep our texts PG :) What we discuss in private is our business." He ended this conversation "Goodnite pretty young Maddie :)."

In the next conversation, defendant told "Maddie" he wanted to meet her. He said he knew he liked her because he would usually stop texting with women who did not respond to him promptly, but instead he waited for her responses "becuz I want you." In the next text conversation, defendant again asked "Maddie" if he could meet her. She said she could get away over the weekend but he would need to pick her up. Defendant agreed. He told her that because she had less freedom of movement, he could work around her schedule and they could meet for "coffee or whatever just to make that first connection :)." "Maddie" responded she could "meet anyone for coffee, [but wanted] to do more than that." Defendant later indicated he did not receive that text message and "Maddie" clarified, "You know what your ad said. That's what I want." Defendant responded "Ok then Maddie. When would you like to meet? Bottom line :)."

The conversation continued with "Maddie" saying, "Depends on how long you want me for. If it's overnight itll have to be a weekend so my mom thinks I'm at a friends house. I'm not allowed to spend the night with friends on school nights." Defendant responded he wanted "Maddie" to spend the night, and "[a]nything else would be a tease :)." Defendant also assured "Maddie" he had condoms when she asked. The two then agreed for defendant to pick up "Maddie" on either Thursday or Friday so that they could spend the weekend together.

As the day approached, the two agreed to meet at the old Walmart in Red Bluff at 9:00 a.m. on Friday morning. The night before the two were to meet, defendant checked in with "Maddie". "Maddie" said she still wanted to meet defendant but was nervous because of the size of his erection in the photos he attached to his Craigslist post. She asked him whether he knew "how to be easy," to which he responded "Of course Maddie. Being easy makes it good and being good makes them come back :)."

After waiting for "Maddie" in the parking lot where he agreed to meet her, defendant became suspicious and drove away. He was arrested during a traffic stop shortly after. Condoms were found upon a search of defendant's home.

DISCUSSION

I

There Was Sufficient Evidence Establishing Defendant's Unnatural And Abnormal Sexual Interest In Children

Defendant contends there was insufficient evidence to support the jury's finding he harbored an unnatural and abnormal sexual interest in children, requiring reversal of his conviction for meeting a minor for lewd purposes. We disagree.

We review sufficiency of the evidence challenges for substantial evidence: " ' "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." ' [Citation.] '[The] appellate court must view the evidence in the light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' [Citations.] 'Evidence is sufficient to support a conviction only if it is substantial, that is, if it " 'reasonably inspires confidence' " [citation], and is "credible and of solid value." ' " (*People v. Fromuth* (2016) 2 Cal.App.5th 91, 103-104.)

To prove defendant met with a minor for lewd purposes under Penal Code[1] section 288.4, the prosecution was required to show, among other things, that defendant was motivated by an unnatural interest in children, and that his unnatural interest in children was a substantial factor in the commission of the crime. (*People v. Fromuth*, *supra*, 2 Cal.App.5th at p. 103.) Defendant argues the prosecution did not make this required showing because the evidence "established at most that [he] allowed himself to be drawn into a tentative tryst with a purported underage female" not that an unnatural and abnormal sexual interest was the motivation for the meeting. In fact, he argues,

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1 Further section references are to the Penal Code unless otherwise indicated.

"[t]he record demonstrates that the unnatural and abnormal motivation for this purported contact was entirely from the law enforcement side. [Defendant] finally went along with the officer's sexual proposal, but there was no evidence that [defendant] had a pre-existing unnatural and abnormal sexual interest in children." As the People point out, defendant's interpretation of the evidence is either inaccurate or in the light most favorable to him and not the judgment as required.

Defendant points to multiple instances he believes show his reluctance to engage in a sexual relationship with "Maddie." First, he cites his text message telling "Maddie" their texts should be PG after he learned she was underage. Defendant's recital of the text messages is inaccurate. True, after defendant learned "Maddie" was underage he told her their contact needed to be PG in character, but this was not meant to define the parties' relationship. Instead, it was for maintaining the illusion of innocence. "Maddie" had just informed defendant the meaning of the phrase to "Netflix and chill" (which the two agreed to do when they met) was to "hook up." Defendant's response was not to correct "Maddie's" misconception of their relationship but to say they could "talk about that after we meet. Being that you say you are under 18 we need to keep our texts PG :) What we discuss in private is our business." This response is sexual in nature, contrary to defendant's assertion. He encouraged "Maddie" to act innocent in text messages that could later be viewed by others and to wait to discuss incriminating topics until they were engaged in a private verbal conversation.

Defendant next points to "Maddie's" text that she did not want to meet him for coffee but wanted what he promised in his Craigslist post. He argues his response -- "I did not get that" -- showed surprise regarding the sexually explicit nature of "Maddie's" comment. This is not an accurate description of this exchange either. Up to this point in their conversation, it was defendant who always suggested meeting and, in the conversation before this one, he told "Maddie" he "want[ed] her." In the exchange defendant cites he did not show surprise at the content of "Maddie's" text when he said,

"I did not get that," he simply stated he did not receive her previous text saying that she wanted to meet for more than coffee. Indeed, before the text defendant cites, the two exchanged messages clarifying what text messages they actually received. Defendant seemed to agree with "Maddie's" ultimate purpose to meet for what defendant promised in his post because he immediately asked her when the meeting would occur and voiced his preference that it be overnight because "[a]nything else would be a tease :)." This confirmed the sexual nature of the two's text exchange in addition to defendant's assurance to "Maddie" that he had condoms.

Defendant also argues "Maddie's" enthusiastic text messages regarding the planned meeting and the size of his penis served to pepper the conversation with sexual overtones that were one sided and not on the part of defendant. This ignores the fact that defendant also sent unsolicited text messages to "Maddie" about his excitement and that the day of the proposed meeting, defendant texted "Maddie" first to check in with her about whether they still had a plan to meet. Defendant argues at this point it was doubtful he intended to meet with "Maddie" but nothing in the text exchange supports that argument. The day before the scheduled meeting, defendant and "Maddie" solidified their plans to meet and defendant assured her he would be gentle with her given the size of his penis because he wanted her to continue seeing him.

Overall, defendant's text messages were more than just flirtatious messages with a girl defendant knew to be underage. The messages alluded to sexual intercourse both on the part of defendant and "Maddie." Every time the topic of meeting each other was brought up, it was defendant who suggested it. Indeed, while "Maddie" said she wanted what defendant promised in his post, it was defendant who wanted to know when that was to occur. Defendant was also the one who chose to have an overnight visit where condoms would be used and assured "Maddie" he would be gentle with her. From this interaction, it was reasonable to infer that defendant was substantially motivated to meet

"pretty young Maddie" because he planned to have sexual contact with her, thus demonstrating his unnatural and abnormal sexual interest in children.

Defendant's reliance on *Jacobson* is misplaced. *Jacobson* involved 26 months of repeated mailings and communications from government agents and fictitious organizations to lure the defendant into receiving child pornography. (*Jacobson v. United States* (1992) 503 U.S. 540, 550 [118 L.Ed.2d 174, 185].) The Supreme Court concluded the government did not meet its burden regarding the defendant's intent because "the prosecution must prove beyond reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents." (*Jacobson*, at p. 549 [118 L.Ed.2d at pp. 184].) By contrast here, defendant was the one to post an advertisement for younger women and it was he who asked to meet "Maddie" multiple times over the course of their texting conversation. He further chose to have an overnight visit with "Maddie," which defendant's text messages implied would be sexual in nature.

Defendant's attempt to distinguish *Fromuth* is unavailing. In *Fromuth*, the defendant was convicted of arranging to meet with a minor for lewd purposes and going to such an arranged meeting. (*People v. Fromuth*, *supra*, 2 Cal.App.5th at p. 95.) The defendant argued on appeal the " 'motivated by' " element -- i.e., that he was " 'motivated by an unnatural or abnormal sexual interest in children' " -- must be a " 'substantial factor' " in the commission of the crime. (*Ibid*.) The court agreed but found the prosecution met its burden because the defendant contacted the fictitious minor after she had posted an advertisement for a sex partner, at which time she told him she was 15 years old. After the fictitious minor cut off contact with the defendant, "he continued for an extended period of time to monitor her advertisement for a sex partner, reinitiated contact, and invited her to keep e-mailing him." (*Id.* at p. 104.) Further, the two "did not engage in any significant communication that was unrelated to their arrangement of a sexual rendezvous." (*Ibid.*)

Similarly, the initial contact between defendant and "Maddie" occurred as a result of a posted advertisement for sex. "Maddie" told defendant her age and defendant did not cease contact, but instead continued to text "Maddie" and ask to meet her. The text messages were sexual in nature and it is clear the two planned to meet for a sexual encounter, given that the meeting would be an overnight visit and the two planned to use condoms. Accordingly, sufficient evidence supports defendant's conviction for meeting a minor for lewd purposes.

II

Prosecutorial Misconduct

A

Procedural Background

Defendant relied on the defense of entrapment. To this end the jury was instructed, "A person is entrapped if a law enforcement officer engaged in conduct that would cause a normally law-abiding person to commit a crime." The instruction provided several examples, including if the officer's conduct amounted to "badgering, persuasion by flattery or coaxing repeated and insistent requests or an appeal to friendship or sympathy." Another example included conduct that would make a crime unusually attractive, such as "a guarantee that the act is not illegal or that the offen[s]e will go undetected, an offer of extraordinary benefit or other similar conduct." Entrapment, however, is not when an officer simply gave defendant "an opportunity to commit the crime or merely tried to gain [defendant]'s confidence through reasonable and restrained steps . . . ." The focus must be on the officer's conduct. "However, in deciding whether the officer's conduct was likely to cause a normally law-abiding person to commit this crime, also consider other relevant circumstances including evidence that happened before the crime, [defendant]'s responses to the officer's urging, the seriousness of the crime and how difficult it would have been for law enforcement officers to discover that a crime had been committed. [¶] When deciding whether

[defendant] was entrapped, consider what a normal law-abiding person would have done in this situation. Do not consider [defendant]'s particular intentions or character or whether [defendant] had a predisposition to commit the crime."

During the prosecutor's rebuttal argument and in response to defendant's entrapment defense, he urged the jury to carefully read the instruction on entrapment because he thought defense counsel misrepresented it to the jury. The prosecutor then argued that being provided with an opportunity to commit a crime is not enough to show entrapment. "You will see [the instruction], but it has to rise far beyond just making it available. What it boils down to, and you make your own interpretation of the instruction when you hear it, but it is you have to find someone who is never inclined to commit a crime and for the police officers to put so much pressure on that person, influence them so heavily that a person who was not inclined to commit a crime at all, not inclined to do the thing that they are talking about, that his will was overwhelmed by the law enforcement pressure and he went ahead and did it or attempted to do it, when you go through these text messages, I challenge [you to] find anything along those lines." After going through defendant's text messages with "Maddie," the prosecutor argued the officer did not put "overwhelming hideous pressure" on defendant that would make a "normally law abiding man" drive an hour to pick up a 15-year-old girl to take her to his house. The prosecutor concluded by asking the jury, "Did the police do anything that was so over the top, so outrageous that a normal law-abiding person would sort of lose their free will and then do a criminal act? No. They provided an opportunity for this man to come down and he took it."

B

The Prosecutor Did Not Commit Misconduct

Defendant contends the prosecutor committed misconduct during closing argument by misstating that the law of entrapment required officers to overwhelm defendant's free will, which prejudiced him because the jury instruction on that defense

inadequately explained that entrapment merely required an unreasonable inducement. The People counter defendant forfeited this contention by failing to object at trial to both the instruction as worded and the prosecutor's argument. Defendant replies that we may reach this issue regardless of his failure because the error resulted in a denial of his "fundamental constitutional rights." We conclude there was no error.

"A prosecutor's misconduct violates the Fourteenth Amendment to the federal Constitution when it 'infects the trial with such unfairness as to make the conviction a denial of due process.' [Citations.] In other words, the misconduct must be 'of sufficient significance to result in the denial of the defendant's right to a fair trial.' [Citation.] A prosecutor's misconduct 'that does not render a criminal trial fundamentally unfair' violates California law 'only if it involves " 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.' " ' " (*People v. Harrison* (2005) 35 Cal.4th 208, 242.) "[I]t is improper for the prosecutor to misstate the law generally [citation], and particularly to attempt to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements." (*People v. Marshall* (1996) 13 Cal.4th 799, 831.)

"When attacking the prosecutor's remarks to the jury, the defendant must show that, '[i]n the context of the whole argument and the instructions' [citation], there was 'a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we "do not lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements.' " (*People v. Centeno* (2014) 60 Cal.4th 659, 667.) The court must consider the challenged statements in the context of the argument as a whole to make its determination. (*People v. Cowan* (2017) 8 Cal.App.5th 1152, 1159.)

Defendant argues the prosecutor's statements equated the defense of entrapment to duress, in that the prosecutor's language was "extreme" pointing to a requirement

defendant not be inclined to commit the crime in the first place and the officer's conduct overwhelmed his will. "In California, the test for entrapment focuses on the police conduct and is objective." (*People v. Watson* (2000) 22 Cal.4th 220, 223.) "[T]he proper test of entrapment in California is the following: was the conduct of the law enforcement agent likely to induce a normally law-abiding person to commit the offense? . . . Official conduct that does no more than offer that opportunity to the suspect -- for example, a decoy program -- is therefore permissible; but it is impermissible for the police or their agents to pressure the suspect by overbearing conduct such as badgering, cajoling, importuning, or other affirmative acts likely to induce a normally law-abiding person to commit the crime." (*People v. Barraza* (1979) 23 Cal.3d 675, 689-690, fn. omitted.) The California standard presumes that a law-abiding person would "normally resist the temptation to commit a crime presented by the simple opportunity to act unlawfully." (*Id*. at p. 690.)

It is not reasonably likely the jury understood or applied the prosecutor's statements as to change the standard required for an entrapment defense. When relating the law, the prosecutor focused on the officer's conduct and not defendant's predisposition to commit the crimes charged. While defendant argues the prosecutor told the jury it must find he was never inclined to break the law, we read the prosecutor's statements differently. The prosecutor was not talking about defendant specifically, he was talking about a law-abiding person in the sense that that person was never inclined to break the law. Nor did he say the jury must make a finding that defendant was a law-abiding person, only that the officer's conduct is judged from that perspective. This is an accurate statement of the law. (See *People v. Barraza*, *supra,* 23 Cal.3d at pp. 689-690.)

The prosecutor's statements about officer conduct needing to overwhelm a person's free will or be so over the top and outrageous as to make a law-abiding person break the law was similarly not misleading. While the prosecutor used adjectives defendant now complains of, he used them in relation to the standard -- that the conduct

result in a law-abiding person breaking the law. A reasonable interpretation of the prosecutor's statements is that if the effect of the officer's conduct is that a law-abiding person would break the law, then that conduct is outrageous and over the top.

Further, the prosecutor told the jury multiple times to pay close attention to the entrapment instruction and to judge for itself what the law was. The prosecutor did not state the law as he understood it as an objective fact but maintained it was his reading of the instruction and the jury should read it to come to its own conclusions. Given the jury was instructed it should ignore argument that conflicts with the jury instructions, we presume the jury did so. (See *People v. Bradford* (1997) 15 Cal.4th 1229, 1337.)

Moreover, the jury instruction on entrapment, which defendant's counsel requested and presumably approved, is correct and not misleading as defendant argues. Defendant's complaint is that the jury instruction gives no rule regarding the standard for entrapment and only examples of what could amount to entrapment. As a result, the jury is left to guess at the benchmark "on which the defense may rest," especially as it concerns sex crimes. We disagree. The instruction begins with an accurate statement of the entrapment defense -- "A person is entrapped if a law enforcement officer engaged in conduct that would cause a normally law-abiding person to commit a crime." Defendant's complaint that the instruction lists no example pertaining to sex crimes is misplaced because the instruction relates no crime-specific examples at all. To the extent the instruction provides examples, these are examples of officer conduct that could cause a person to commit a crime in general, not any specific crime. The jury was not left to guess at the benchmark that applied to sex crimes specifically as defendant argues. The benchmark for sex crimes as it pertains to entrapment is the same for all crimes and was communicated to the jury in the jury instruction. Thus, the jury instruction accurately related the law of entrapment and did not confuse the jury as to the law it was to apply. Accordingly, there was no prosecutorial misconduct.

III

The Instructional Error Was Harmless

As for the charge that defendant contacted a minor with the intent to commit a sexual offense, the court instructed the jury over defendant's objection that he was guilty if it found he had contacted "Maddie" with the intent to commit unlawful sexual intercourse in violation of section 261.5, subdivision (c), despite the fact that that section is not an enumerated offense under the charged crime. (§ 288.3, subd. (a).)

Defendant contends, and the People concede, this was error. We agree this section does not appear as an enumerated sexual offense upon which a guilty finding for contacting a minor can be based. (§ 288.3, subd. (a).) Regardless, the People argue, any error was harmless beyond a reasonable doubt because the jury made findings equivalent to a violation of section 288, subdivision (c), which is an enumerated sexual offense under the charged section. We agree.

Our Supreme Court has held that an error in instructions on the elements of a crime is harmless "so long as the error does not vitiate *all* of the jury's findings," meaning it would be harmless error if it were "clear beyond a reasonable doubt that a rational jury would have rendered the same verdict absent the error." (*People v. Merritt* (2017) 2 Cal.5th 819, 829, 831.) It also held that offering an instruction on an invalid legal theory may be harmless when " 'other aspects of the verdict or the evidence leave no reasonable doubt that the jury made findings necessary' " to find the defendant guilty under an alternative, valid legal theory. (*In re Martinez* (2017) 3 Cal.5th 1216, 1226, quoting *People v. Chun* (2009) 45 Cal.4th 1172, 1205.) Thus, "we apply the *Chapman* standard [citation] to evaluate an instruction that improperly defines an element of a charged offense." (*People v. Stutelberg* (2018) 29 Cal.App.5th 314, 319; *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 710-711].) Under *Chapman*, an instructional error must result in reversal unless it appears beyond a reasonable doubt that the error did not contribute to the verdict. (*Stutelberg*, at p. 319.)

The jury found defendant went to a prearranged meeting with a minor for the purpose of engaging in lewd or lascivious behavior. (§ 288.4.) It also found defendant contacted a minor with the intent to commit a sexual offense, specifically section 261.5, subdivision (c) -- to engage in unlawful sexual intercourse with a minor under the age of 18 and more than three years younger than defendant. (§ 288.3.) While the intent to commit unlawful sexual intercourse under section 261.5 does not support a conviction for contacting a minor, it and the jury's findings regarding meeting a minor for lewd purposes support such a conviction premised upon an intended violation of section 288.

Section 288, which is an enumerated offense in section 288.3, provides, "Any person who willfully and lewdly commits any lewd or lascivious act . . . upon or with the body, or any part or member thereof, of a child . . . with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony . . . ." (§ 288, subd. (a).) Where "the victim is a child of 14 or 15 years, and that person is at least 10 years older than the child . . . [the person] shall be punished by imprisonment in the state prison for one, two, or three years . . . ." (§ 288, subd. (c)(1).)

By finding defendant guilty of meeting a minor for lewd purposes, the jury necessarily found defendant intended to commit a lewd and lascivious act. (See § 288.4.) Through this finding of guilt, it also found defendant was motivated by his abnormal sexual interest in children, thus also fulfilling the specific intent element of section 288 in that defendant acted " 'with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or child . . . .' " (*People v. Cavallaro* (2009) 178 Cal.App.4th 103, 114.)

As for defendant's victim's age, the jury found "Maddie" was under the age of 18. (See § 261.5, subd. (c).) The only evidence presented on this point was "Maddie's" text message to defendant that she was almost 16 years old, meaning she was 15 years old. Given the exclusive evidence on this point, we are confident beyond a reasonable doubt

that the jury would have found "Maddie" was 15 years old at the time of the intended offense.

As for defendant's age, the jury found he was at least three years older than "Maddie." (See § 261.5, subd. (c).) The evidence presented on this point was defendant's Craigslist post, which advertised he was 47 years old. Given this uncontradicted evidence, we are confident beyond a reasonable doubt the jury would have found defendant at least 10 years older than "Maddie" at the time of the intended offense.

Because it is clear the jury would have found defendant intended to commit lewd and lascivious acts on "Maddie" in violation of section 288, subdivision (c)(1) when he contacted her, the omission of this element from the jury instruction was harmless beyond a reasonable doubt.

Defendant's case must still be remanded for resentencing, however, because the term of imprisonment for violating section 288.3 predicated upon an intended violation of section 288 is different than the term defendant received. A person found guilty of violating section 288.3 "shall be punished by imprisonment in the state prison for the term prescribed for an attempt to commit the intended offense." (§ 288.3, subd. (a).) An attempt to commit section 288, subdivision (c)(1) is punishable by six months, one year, or 18 months. (§§ 288, 664, subd. (a).) Even if sentenced to one-third the midterm, doubled pursuant to the three strikes law, as defendant was, defendant would not receive the one year four months to which he was originally sentenced. Remand is appropriate for the trial court to properly sentence defendant on this count.

IV

Sentencing

A

Procedural Background

Defendant admitted having previously been convicted of a prior strike offense; specifically, a 1984 conviction for first degree burglary. The parties agreed this conviction resulted from defendant entering a residence and taking a car from the garage. Before defendant could be sentenced to this offense he was convicted of escape. Then in 1988, he was convicted of vehicle theft followed by a 1990 conviction for burglary. Two years later, defendant was again convicted of burglary and sentenced to six years in prison. In 1996 and in 2000, he was convicted of petty theft with a prior. Also in 2000, defendant was convicted of second degree burglary, after which he remained crime free until 2012 when he was convicted of grand theft. Defendant committed the present offense in 2017.

While he acknowledged he was sorry for his involvement and showed poor judgment in the current offenses, he maintained that he was not a risk to the community and was entrapped by police officers. In his written statement to the court, defendant indicated he was a hard worker who usually held multiple jobs. He also indicated he had strong support from his ex-wife who told him he could live with her upon his release from prison. Defendant acknowledged his past criminal behavior and that it "clearly reflects something that was a problem for me for a long time," however, "[t]he past [nine] years would also reflect my ability and effort to eliminate thievary [*sic*] as a bad problem in my life. A bad thief I was, a sex offender I am not."

Defendant was also assessed under the Static-99R risk assessment, which is an actuarial instrument designed to predict the risk of reoffense for sex offenders. He scored "**level III** which means his relative risk level is **average risk** which represents the risk of

someone in this score group being charged or convicted of another sexual offense within five years after he is released on probation."

Defendant moved the court to dismiss his prior strike conviction pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. The court denied the motion stating, "My concern with [defendant] is that he now has -- well, he's previously been convicted of seven felonies. I do understand that there was a break between 1998 and 2011, but he has continued his criminal conduct. With the conviction of these two most recent felonies, the Court believes that his seriousness of criminal behavior has increased. [¶] Also, I looked at [defendant]'s attitude towards the current offense, and based on his comments to probation and his view of the behavior, I don't believe that he would be successful on probation in the future. And I also considered the Static 99 results, which indicated that [defendant] is at average risk for re-offense. So, keeping all of those things into consideration, but mostly relying on the fact that he has had a very extensive and very long-term felony convictions dating back 30 years, that I am inclined to -- or I am going to deny the *Romero* motion and I am not going to strike the strike."

The court then sentenced defendant to the upper term of four years, doubled to eight, for meeting a minor for lewd purposes. It sentenced him to eight months, doubled to one year four months, for contacting a minor with the intent to commit a sexual offense but stayed that sentence pursuant to section 654. When announcing sentence, the trial court stated it had read the probation report and found the factors in aggravation outweighed the factors in mitigation. It further voiced its concern that defendant's crimes seem to be increasing in seriousness and that the Static-99R assessment indicated defendant was at an average risk for reoffending.

B

The Court Did Not Abuse Its Discretion By Denying Defendant's Romero Motion

Defendant contends the trial court abused its discretion by denying his request to strike his strike offense despite the remoteness of the strike, the significant period in

which he remained crime free, and the inchoate nature of his current offense. We disagree.

Our Supreme Court held, in *Romero*, that trial courts have discretion under section 1385 to dismiss a prior strike when a court finds a defendant falls outside the spirit of the three strikes law. (*People v. Superior Court (Romero)*, *supra*, 13 Cal.4th at pp. 529-530.) In deciding whether to exercise this discretion, the court "must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

A trial court's "failure to . . . strike a prior [felony] conviction allegation is subject to review under the deferential abuse of discretion standard." (*People v. Carmony* (2004) 33 Cal.4th 367, 374.) "[A] trial court will only abuse its discretion in failing to strike a prior felony conviction allegation in limited circumstances." (*Id*. at p. 378.) The circumstances where no reasonable people could disagree that the criminal falls outside the spirit of the three strikes scheme is one such circumstance, but the showing must be extraordinary. Reversal is also justified where the trial court was unaware of its discretion to dismiss a prior strike or considered impermissible factors in declining to dismiss. (*Ibid*.) But where the trial court, aware of its discretion, " 'balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance.' " (*Ibid*.)

When making its ruling, the court balanced the relevant factors and stated its reasons for denying defendant's *Romero* motion -- that defendant had an extensive criminal history and, while he remained crime free for 13 years, his current offense was more serious than his prior offenses and he refused to acknowledge his wrongdoing

indicating he would not be successful on probation. Defendant argues this decision amounted to an abuse of discretion because the court failed to consider the inchoate nature of his current offense and instead "exaggerated" its harm when it is clear that he was not motivated by an abnormal sexual interest in children. He further argues his prior strike offense was "too remote," in that it was 34 years old and of a different type than his current offense.

First, the court did consider the nature of defendant's current offense, and as we have discussed, sufficient evidence supports the finding that he was motivated by his abnormal sexual interest in children when committing it. The court thought the circumstances of defendant's current offense more serious than his prior offenses. Those circumstances include the inchoate nature of the offense and the fact that the victim was an officer posing as a minor. Still, given that defendant's current crimes were attempted sex offenses directed at a minor, the court did not abuse its discretion in finding them of a more serious nature than his prior burglary conviction.

Second, the court acknowledged defendant's strike conviction was remote and that he lived a crime-free life for 13 years following his past incarcerations. This factor, however, paled in comparison to defendant's chronic reoffending and inability to acknowledge his current culpability. The court reasonably concluded from this that defendant was not likely to remain crime free in the future, especially considering the nature of his current convictions.

Accordingly, the trial court did not abuse its discretion by denying defendant's *Romero* motion.

C

The Trial Court Stated Sufficient Reasons To Impose The Upper Term For Meeting A Minor For Lewd Purposes

Defendant contends the trial court erred by relying solely on the Static-99 assessment when imposing the upper term of imprisonment on his conviction for meeting a minor for lewd purposes. We disagree.

A trial court's decision to impose the upper term is subject to review for abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.) A trial court abuses its discretion if it "relies upon circumstances . . . not relevant to the decision or that otherwise constitute an improper basis for [its] decision." (*Ibid*.) In exercising its discretion to impose a sentencing judgment, the court may consider circumstances in aggravation or mitigation, and any other factor reasonably related to the sentencing decision. (Cal. Rules of Court, rule 4.420(b).) Even one aggravating factor is enough to justify imposition of an upper term, and a court may minimize or even completely disregard mitigating factors without stating its reasons. (*People v. Lai* (2006) 138 Cal.App.4th 1227, 1258.)

Here, the trial court indicated it imposed the upper term on defendant's conviction for meeting a minor for lewd purposes because the Static-99R assessment indicated he was at an average risk of reoffending and also because of the aggravating factors listed in the probation report -- defendant had numerous convictions, served multiple prior prison terms, and had previously been unsuccessful while on parole. The court further stated it was basing its decision on the fact that defendant's crimes increased in seriousness. Thus, even if defendant is right that basing an upper term sentence on the Static-99R assessment alone constitutes an abuse of discretion, that is not what happened here.[2] The

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[2] While we do not decide the validity of defendant's argument, we note the court is permitted to sentence a defendant based on "[a]ny factor statutorily declared to be

court adopted the three reasons stated in the probation report, which articulated factors listed in the California Rules of Court. (Cal. Rules of Court, rule 4.421(b)(2) [numerous crimes], (3) [prior prison term], (5) [performance on probation or parole].) The court also listed one of its own. (*Id.*, rule 4.421(b)(2) [seriousness of crimes].) Defendant does not challenge these findings. Accordingly, the court did not abuse its discretion when sentencing defendant to the upper term for meeting a minor for lewd purposes.

DISPOSITION

The case is remanded for the trial court to resentence defendant on count II, contacting a minor with the intent to commit a sexual offense. The judgment is otherwise affirmed.

/s/
Robie, J.

We concur:

/s/
Raye, P. J.

/s/
Krause, J.

circumstances in aggravation or *that reasonably relate to the defendant* or the circumstances under which the crime was committed." (Cal. Rules of Court, rule 4.421(c), italics added.)